

NO. 43226-9-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent

vs.

NATHAN R. WRIGHT,

Appellant

APPEAL FROM THE SUPERIOR COURT
FOR MASON COUNTY

The Honorable Toni A. Sheldon, Judge
Cause No. 11-1-00195-4

BRIEF OF APPELLANT

THOMAS E. DOYLE, WSBA NO. 10634
Attorney for Appellant

P.O. Box 510
Hansville, WA 98340-0510
(360) 638-2106

TABLE OF CONTE

	<u>Page</u>
A. ASSIGNMENTS OF ERROR	1
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	1
C. STATEMENT OF THE CASE	2
D. ARGUMENT	6
01. WRIGHT’S CRIMINAL CONVICTIONS FOR POSSESSION OF HEROIN, COUNT COUNT II, AND UNLAWFUL USE OF DRUG PARAPHERNALIA, COUNT III, MUST BE REVERSED WHERE HE LACKED POSSESSION AND PROVED THAT HIS ALLEGED POSSESSION WAS UNWITTING.....	6
02. THE TRIAL COURT ACTED WITHOUT AUTHORITY IN ORDERING WRIGHT NOT TO FREQUENT PLACES WHOSE PRIMARY BUSINESS IS THE SALE OF LIQUOR AND TO HAVE A CHEMICAL DEPENDENCY EVALUATION.....	10
E. CONCLUSION	13

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>Washington Cases</u>	
<u>City of Kennewick v. Day</u> , 142 Wn.2d 1, 11 P.3d 304 (2000).....	7
<u>San Juan County v. Ayer</u> , 24 Wn. App. 860, 604 P.2d 1304 (1979).....	7
<u>State v. Armendariz</u> , 160 Wn.2d 106, 156 P.3d 201 (2007).....	11
<u>State v. Bahl</u> , 164 Wn.2d 739, 193 P.3d 678 (2008)	11
<u>State v. Balzer</u> , 91 Wn. App. 44, 954 P.2d 958 (1998).....	6
<u>State v. Cleppe</u> , 96 Wn.2d 373, 635 P.2d 435 (1981), <u>cert. denied</u> , 456 U.S. 1006 (1982).....	7
<u>State v. Craven</u> , 67 Wn. App. 921, 841 P.2d 774 (1992)	6
<u>State v. Delmarter</u> , 94 Wn.2d 634, 618 P.2d 99 (1980).....	6
<u>State v. Ford</u> , 37 Wn.2d 472, 973 P.2d 452 (1999)	11
<u>State v. Jones</u> , 118 Wn. App. 199, 76 P.3d 258 (2003)	11, 13
<u>State v. McKee</u> , 141 Wn. App. 22, 167 P.3d 575 (2007)	12
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992)	6
<u>State v. Staley</u> , 123 Wn.2d 794, 872 P.2d 502 (1994).....	7
<u>State v. Wiley</u> , 79 Wn. App. 852, 604 P.2d 1304 (1979)	7
<u>Statutes</u>	
RCW 9.94A.030.....	12
RCW 9.94A.607.....	12

RCW 9.94A.703.....	12
RCW 9A.76.170.....	2
RCW 46.61.520	2
RCW 69.50.4013	2, 7
RCW 69.50.412	2

A. ASSIGNMENTS OF ERROR

01. The trial court erred in not taking count II, unlawful possession of heroin, from the jury for lack of sufficiency of the evidence.
02. The trial court erred in not taking count II, unlawful possession of heroin, from the jury where Wright produced sufficient evidence that his alleged possession was unwitting.
03. The trial court erred in not taking count III, unlawful use of drug paraphernalia, from the jury for lack of sufficiency of the evidence.
04. The trial court erred in imposing a community custody condition prohibiting Wright from frequenting places whose primary business is the sale of liquor.
05. The trial court erred in imposing a community custody condition requiring Wright to have a chemical dependency evaluation.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether the trial court erred in not taking count II, unlawful possession of heroin, from the jury for lack of evidence that Wright constructively possessed the heroin?
[Assignment of Error No. 1].
02. Whether Wright proved by a preponderance of the evidence that his alleged possession of heroin was unwitting?
[Assignment of Error No. 2].
03. Whether the trial court erred in not taking count III, unlawful use of drug paraphernalia, from the jury for lack of evidence?
[Assignment of Error No. 3].

04. Whether the trial court acted without authority in ordering Keith not to frequent places whose primary business is the sale of liquor and to have a chemical dependency evaluation? [Assignment of Errors Nos. 4 and 5].

C. STATEMENT OF THE CASE

01. Procedural Facts

Nathan R. Wright (Wright) was charged by first amended information filed in Mason County Superior Court on December 8, 2011, with vehicular homicide, count I, unlawful possession of heroin, count II, and unlawful use of drug paraphernalia, count III, contrary to RCWs 46.61.520, 69.50.4013 and 69.50.412(1), respectively. [CP 90-91].

No pre-trial motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. Trial to a jury commenced the following February 23rd, the Honorable Toni A. Sheldon presiding. Neither objections nor exceptions were taken to the jury instructions. [RP 433].¹

The jury returned verdicts of guilty, Wright was sentenced within his standard range, and timely notice of this appeal followed. [CP 3-21].

//

//

¹ All references to the Report of Proceedings are to transcripts entitled VOLUMES I-III.

02. Substantive Facts

On Wednesday, October 27, 2010, at approximately 6:23 in the morning, an unoccupied school bus driven by Susan Montano-Felton was rear-ended by an SUV driven by Wright as Montano-Felton was slowing down to make a signaled left turn. [RP 16, 30, 34, 77]. Wright's passenger, Kahil Marshall, who was the registered owner of the SUV [RP 160], died as a result of the accident [RP 267, 283-84], while Wright suffered broken ribs, ankle and various lacerations. [RP 316]. Neither Wright nor Marshall was wearing a seatbelt. [RP 214, 313]. Though emotionally shaken, Montano-Felton suffered no serious injury. [RP 16-17, 60, 70].

The ensuing investigation established that it was dark enough for headlights and "mostly clear." [RP 89]. "The roads were dry." [RP 166]. Immediately prior to the collision, Wright was seen driving the SUV in an erratic manner "above the speed limit and swerving occasionally to the right or left out of its lane" before apparently failing to observe the slowing bus prior to impact. [RP 54, 57].

The - - vehicle hit the bus and it was like it - - almost like it jumped up in the air kind of. The back of the vehicle actually came up off the road and it was - - it looked like it hit and went up in the air and kind of bounced back. And there were parts flying all over, small parts flying all over.

[RP 58].

Seized from the SUV were two syringes located on the driver's side floorboard [RP 120, 170, 203] and a spoon with a small piece of cotton found on the center console that subsequently tested positive for the presence of heroin. [RP 122, 171-73, 299-300]. The toxicologist's analysis revealed "0.05 milligrams per liter" of methamphetamine in Wright's system. [RP 192-93, 249]. "(I)t's safe to say it was taken within the last day." [RP 253]. The same amount of methamphetamine was in Marshall's system. [RP 285, 373]. Unwanted side effects of methamphetamine include impairment of decision making skills:

Your reaction time can be affected, and it is harder to focus on multiple tasks that you have to perform at the same time. So when you're - - when you're performing a complex divided attention task like driving, it's hard to focus on everything that is coming into your senses, that you're taking into your eyes and ears. It's hard to focus on each of those and decide what's going on, what do I do about it, in a - - in a quick manner.

[RP 254].

A forensic toxicologist testifying on Wright's behalf concluded that the impact, if any, of the methamphetamine could not be determined: "Wouldn't be able to say anything - - make a statement as to whether it had an impact or - - or not because there's not enough information available to draw that conclusion." [RP 374].

At the hospital, Wright was examined by a drug recognition expert, who, while admitting he had previously stated there was no indication of impairment [RP 227, 231], said he had “mis-spoke (sic).” [RP 238]. “I would (now) say he probably was under the influence of something that caused him to be impaired.” [RP 237].

Wright admitted he had used methamphetamine the weekend before the collision, which occurred on Wednesday, but that he was not affected by any drugs at the time of the accident. [RP 314-15]. At the hospital that afternoon he explained the collision:

And I came around the corner and we were just driving.
And I was going about 65, and I looked down, and then
when I looked back up, I was right behind the bus and I
smashed into I, which I didn’t even hit the brakes. It was
just instantly, just smashed....

[RP 310].

And the speed limit was 60. I know I was going a little
over, but not much....

[RP 312].

//

//

//

//

//

D. ARGUMENT

01. WRIGHT’S CRIMINAL CONVICTIONS
FOR POSSESSION OF HEROIN, COUNT
COUNT II, AND UNLAWFUL USE OF
DRUG PARAPHERNALIA, COUNT III,
MUST BE REVERSED WHERE HE LACKED
POSSESSION AND PROVED THAT HIS
ALLEGED POSSESSION WAS UNWITTING.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

Unwitting possession is an affirmative defense to the charge of possession of a controlled substance. State v. Balzer, 91 Wn. App. 44, 67, 954 P.2d 958 (1998). To establish the defense, a defendant must prove by

a preponderance of the evidence that the possession of the unlawful substance is unwitting. State v. Wiley, 79 Wn. App. 852, 860, 604 P.2d 1304 (1979). “Preponderance of the evidence” means that unwitting possession must be more probably true than not true. San Juan County v. Ayer, 24 Wn. App. 852, 860, 604 P.2d 1304 (1979). There are two alternative ways of establishing the defense: (1) that the defendant did not know he or she was in possession of the controlled substance; or (2) that the defendant did not know the nature of the substance he or she possessed. City of Kennewick v. Day, 142 Wn.2d 1, 11, 11 P.3d 304 (2000).

Washington courts have adopted the unwitting possession defense in order to ameliorate the harshness of the almost strict liability imposed by RCW 69.50.4013. See State v. Cleppe, 96 Wn.2d 373, 380-81, 635 P.2d 435 (1981), cert. denied, 456 U.S. 1006 (1982). The premise for the defense is that possession, although unlawful, should be excused if there was no culpable mental state. See State v. Staley, 123 Wn.2d 794, 799-800, 872 P.2d 502 (1994).

Here, the trial court gave the following jury instruction regarding unwitting possession.

A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know

that the substance was in his possession or did not know the nature of the substance.

The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true.

[Court's Instruction 17; CP 47].

01.1 Count II: Possession of Heroin

The evidence presented was insufficient to prove that Wright constructively possessed the heroin, while the same facts and circumstances establish proof by a preponderance of the evidence that Wright's alleged possession of heroin was unwitting and that his conviction must be reversed where there was insufficient evidence to disprove this claim.

Prior to the collision, there is no indication as to where any of the items, particularly the spoon containing heroin, were located. And following the violent impact, everything in the SUV, including the two occupants, neither of whom was wearing a seatbelt, got thrown around. Also, this: given that the vehicle was registered to Marshall and that the heroin was found in the spoon covered by her body [RP 171], it cannot be seriously argued that there was sufficient evidence of Wright's dominion and control of the heroin, let alone that he even knew it was there. There

is simply no way to tell where anything was or how long it had been there prior to the accident. The evidence is not there. This isn't an abstract speculation.

01.2 Count III: Unlawful Use of Drug Paraphernalia

For many of the same reasons, Wright's conviction for unlawful use of drug paraphernalia must be reversed. During closing, the State laid down this assertion, which is worth quoting at modest length:

The - - the - - the heroin was stored in the spoon. The spoon was used to prepare it, to put into the human system. That was in his possession. The heroin was - - was stored in the spoon. That's use of drug paraphernalia.

[RP 469].

The essential facts here are not in much dispute. It is the interpretation that each side sees differently. And the State's interpretation is profoundly flawed. As previously indicated, there is no evidence as to how long the spoon had been in the car, no evidence as to where the spoon was prior to impact, and no evidence that Wright was even aware of the spoon's presence in Marshall's vehicle. The evidence just isn't there.

01.3 Conclusion

Based on the evidence presented, or lack thereof, there was insufficient proof that Wright constructively possessed the heroin or the

spoon or was even aware of the spoon's existence. Moreover, the same facts and all reasonable inferences to be drawn therefrom, by a preponderance of the evidence, demonstrate that Wright did not know he was in possession of heroin or the spoon or know of the spoon's existence or even the nature of the substance in the spoon, with the result that his convictions for possession of heroin and unlawful use of drug paraphernalia must be reversed.

02. THE TRIAL COURT ACTED WITHOUT AUTHORITY IN ORDERING WRIGHT NOT TO FREQUENT PLACES WHOSE PRIMARY BUSINESS IS THE SALE OF LIQUOR AND TO HAVE A CHEMICAL DEPENDENCY EVALUATION.

As conditions of community custody, the court ordered that Wright:

... shall not go into bars, taverns, lounges, or other places whose primary business is the sale of liquor;

... shall have a chemical dependency evaluation while in confinement or within 30 days of release from custody, provide a copy of the evaluation to the CCO, successfully participate in and complete all recommended treatment, and sign all releases necessary to ensure the CCO can consult with the treatment provider to monitor progress and compliance;

[CP 14].

““In the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.”” State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (quoting State v. Ford, 37 Wn.2d 472, 477, 973 P.2d 452 (1999)). This court reviews whether a trial court had statutory authority to impose community custody conditions de novo. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

02.1 Frequenting Places Selling Liquor

There was no evidence at trial that alcohol played any part in Wright’s crimes. In State v. Jones, 118 Wn. App. 199, 76 P.3d 258 (2003), the defendant pleaded guilty to several offenses and the court imposed conditions of community custody relating to alcohol consumption and treatment. As here, nothing in the record indicated that alcohol contributed to Jones’s offenses. Id. at 207-08. This court found that although the trial court had authority to prohibit consumption of alcohol, it did not have the authority to order the defendant “to participate in alcohol counseling(,)” Id. at 208, reasoning that the legislature intended a trial court to be able “to prohibit the consumption of alcohol regardless of whether alcohol had contributed to the offense.” Id. at 206. In contrast, when ordering participation in treatment or counseling, the treatment or counseling must be related to the crime. Id. at 207-08; see also State v.

McKee, 141 Wn. App. 22, 34, 167 P.3d 575 (2007) (community custody provisions prohibiting purchasing and possession of alcohol invalid where alcohol did not play a role in the crime), reviewed denied, 163 Wn.2d 1049 (2008). And while RCW 9.94A.703(3)(e), authorizes the sentencing court to order that an offender refrain from consuming alcohol, there is no such authority forbidding an offender from frequenting places whose primary business is the sale of liquor, sans any evidence and argument that it qualifies as a crime-related prohibition under RCW 9.94A.703, which constitutes “an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted...” RCW 9.94A.030(10).

The condition prohibiting Wright from frequenting places selling liquor is invalid because there was no evidence that alcohol played any part in his offenses, with the result that it is not a crime-related prohibition and must be stricken.

02.2 Chemical Dependency Evaluation

The court erred in ordering a chemical dependency evaluation and any recommended treatment without first making a finding of chemical dependency under RCW 9.94A.607(1), which provides:

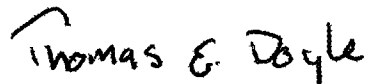
Where the court finds that the offender has a chemical dependency that has contributed to his or her offense, the court may, as a condition of the sentence and subject to available resources, order the offender to participate in rehabilitative programs or otherwise to perform affirmative conduct reasonable related to the circumstances of the crime for which the offender has been convicted and reasonably necessary or beneficial to the offender and the community in rehabilitating the offender. (emphasis added).

See State v. Jones, 118 Wn. App. at 209-10 (failure to make statutorily required finding before ordering mental health treatment and counseling was reversible error even though record contained substantial evidence supporting such a finding). This condition must also be stricken.

E. CONCLUSION

Based on the above, Wright respectfully requests this court to reverse his convictions for possession of heroin and unlawful use of drug paraphernalia and remand for resentencing consistent with the arguments presented herein.

DATED this 19th day of October 2012.

A handwritten signature in black ink that reads "Thomas E. Doyle". The signature is written in a cursive, slightly slanted style.

THOMAS E. DOYLE
Attorney for Appellant
WSBA NO. 10634

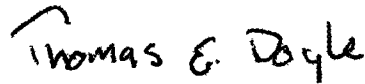
CERTIFICATE

I certify that I served a copy of the above brief on this date as follows:

Tim Higgs
timh@co.mason.wa.us

Nathen R. Wright #308603
Monroe Correctional Complex
C-200 WSRU
16700 177th Avenue SE
Monroe, WA 98272

DATED this 19th day of October 2012.

A handwritten signature in black ink that reads "Thomas E. Doyle". The signature is written in a cursive style with a large initial 'T'.

THOMAS E. DOYLE
Attorney for Appellant
WSBA NO. 10634

DOYLE LAW OFFICE

October 19, 2012 - 2:38 PM

Transmittal Letter

Document Uploaded: 432269-Appellant's Brief.pdf

Case Name: Sate v. Wright

Court of Appeals Case Number: 43226-9

Is this a Personal Restraint Petition? ☐ Yes ☒ No

The document being Filed is:

- ☐ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ☐ Statement of Arrangements
- ☐ Motion: _____
- ☐ Answer/Reply to Motion: _____
- ☒ Brief: Appellant's
- ☐ Statement of Additional Authorities
- ☐ Cost Bill
- ☐ Objection to Cost Bill
- ☐ Affidavit
- ☐ Letter
- ☐ Copy of Verbatim Report of Proceedings - No. of Volumes: _____
Hearing Date(s): _____
- ☐ Personal Restraint Petition (PRP)
- ☐ Response to Personal Restraint Petition
- ☐ Reply to Response to Personal Restraint Petition
- ☐ Petition for Review (PRV)
- ☐ Other: _____

Comments:

No Comments were entered.

Sender Name: Thomas E Doyle - Email: ted9@me.com

A copy of this document has been emailed to the following addresses:
timh@co.mason.wa.us